

Message Text

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SUBJECT: WAR CRIMES AMENDMENT TO CONSTITUTION

1. IN PARLIAMENT JULY 12 BDG INTRODUCED THE FIRST CONSTITUTIONAL AMENDMENT BILL TO ENABLE PASSAGE OF WAR CRIMES LEGISLATION. THE AMENDMENT, AS DESCRIBED IN LOCAL PRESS, SPECIFIES THAT NO LAW PROVIDING FOR THE DETENTION, PROSECUTION OR PUNISHMENT OF ANY PERSON, INCLUDING MEMBERS OF THE MILITARY AND POWS, FOR GENOCIDE, CRIMES AGAINST HUMANITY OR WAR CRIMES SHALL BE DEEMED UNLAWFUL BECAUSE IT IS INCONSISTENT WITH THE CONSTITUTION. THE AMENDMENT ALSO DEPRIVES PEOPLE ACCUSED OF SUCH CRIMES OF THE CONSTITUTIONAL RIGHTS TO PROTECTION OF THE LAW, PROTECTION AGAINST EX POST FACTO LAW, THE RIGHT TO A FAIR TRIAL, AND THE RIGHT TO APPEAL TO THE SUPREME COURT.

2. TEXT OF PROPOSED NEW CLAUSE 3 TO ARTICLE 47 OF THE CONSTITUTION, AS PUBLISHED IN PRESS, IS : "NOTWITHSTANDING ANYTHING CONTAINED IN THIS CONSTITUTION, NO LAW OR NO LIMITED OFFICIAL USE

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PROVISION OF ANY LAW OF ANY PERSONS, INCLUDING

A PERSON WHO IS A MEMBER OF ANY ARMED OR DEFENCE
AUXILIARY FORCE OR WHO IS A PRISONER OF WAR, FOR
GENOCIDE, CRIMES AGAINST HUMANITY OR WAR CRIMES AND
OTHER CRIMES UNDER INTERNATIONAL LAW SHALL BE DEEMED
VOID OR UNLAWFUL, OR EVER TO HAVE BECOME VOID OR
UNLAWFUL, ON THE GROUND THAT SUCH LAW OR PROVISION OF
ANY SUCH LAW IS INCONSISTENT WITH, OR REPUGNANT TO,
ANY OF THE PROVISIONS OF THIS CONSTITUTION."

3. A NEW ARTICLE 47A WOULD DEPRIVE PERSONS CHARGED
WITH SUCH CRIMES OF FUNDAMENTAL RIGHTS GUARANTEED UNDER
ARTICLES 31, 35, AND 44 OF THE CONSTITUTION.
ARTICLE 47A ALSO STATES THAT "NOTWITHSTANDING ANYTHING
CONTAINED IN THIS CONSTITUTION, NO PERSON TO WHOM A
LAW MENTIONED IN CLAUSE 3 OF ARTICLE 47 APPLIES SHALL
HAVE THE RIGHT TO MOVE THE SUPREME COURT FOR ANY OF
THE REMEDIES UNDER THIS CONSTITUTION".

4. ARTICLE 47 OF THE CONSTITUTION IN ITS TWO PRESENT
CLAUSES PROVIDES THAT (1) NO LAWS PASSED TO "GIVE
EFFECT TO ANY OF THE FUNDAMENTAL PRINCIPLES OF
STATE POLICY" (ESSENTIALLY LAWS CONCERNING
NATIONALIZATION AND PROPERTY RIGHTS) SHALL BE CONSIDERED
INCONSISTENT WITH THE FUNDAMENTAL RIGHTS GUARANTEED
BY THE CONSTITUTION; (2) CERTAIN PREVIOUS LAWS AS
SPECIFIED IN SCHEDULE I OF THE CONSTITUTION
(PRINCIPALLY PRESIDENT'S ORDERS ISSUED BETWEEN
LIBERATION AND THE CONVENING OF THE JATIYO SANGSAD
IN APRIL) SHALL CONTINUE IN EFFECT AND NONE OF
THEM SHALL BE CONSIDERED INCONSISTENT WITH THE CONSTITUTION.

5. ARTICLE 31 PROVIDES THAT PROTECTION OF THE LAW IS
"THE INALIENABLE RIGHT OF EVERY CITIZEN, WHEREVER
HE MAY BE", AND OF EVERY OTHER PERSON TEMPORARILY IN BANGLADESH.
THE CLAUSE OF ARTICLE 35 PROVIDES THAT NO PERSON
(1) SHALL BE CONVICTED OF ANY OFFENCE UNDER AN
EX POST FACTO LAW; (2) BE SUBJECT TO DOUBLE JEOPARDY;
(3) BE DEPRIVED OF A SPEEDY AND PUBLIC TRIAL BY AN
INDEPENDENT AND IMPARTIAL COURT OR TRIBUNAL;
(4) BE COMPELLED TO BE A WITNESS AGAINST HIMSELF;
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(5) BE SUBJECTED TO TORTURE OR CRUEL, INHUMAN OR
DEGRADING PUNISHMENT. CLAUSE 6, HOWEVER, STATES
THAT NOTHING IN CLAUSES 3 TO 5 SHALL AFFECT EXISTING
LAW PRESCRIBING PUNISHMENT AND TRIAL PROCEDURE.
ARTICLE 44 GRANTS THE RIGHT TO MOVE THE SUPREME COURT
FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS.

6. COMMENT: THE AMENDMENT SEEMS PRINCIPALLY

GEARED TO OVERCOME THE PROBLEM CREATED BY THE CONSTITUTIONAL GUARANTEE AGAINST PROSECUTION UNDER EX POST FACTO LAW. IN THE CASE OF THE COLLABORATOR'S ORDER OF JANUARY 1972, A YEAR BEFORE THE DRAFTING OF THE CONSTITUTION, BDG RESOLVED THIS PROBLEM BY MAKING THE ORDER RETROACTIVE AS "DEEMED TO HAVE TAKEN EFFECT" ON MARCH 26, 1971. GIVEN THE IMPORTANCE OF THE POW TRIALS AND BDG'S APPARENT DESIRE TO ASSERT A DOMESTIC LEGAL RIGHT TO TRY POWS FOR WAR CRIMES RATHER THAN TO RELY SOLELY ON INTERNATIONAL LAW, BDG EVIDENTLY HAS CHOSEN NOT TO RELY ON RETROACTIVE LEGISLATION OR AMENDMENT TO PREVIOUS PREIDENT'S ORDERS. BDG'S DECISION TO CONSTITUTIONALLY DEPRIVE THE POW DEFENDANTS OF PROTECTION AGAINST EX POST FACTO LAWS, THE RIGHT TO SPEEDY TRIALS, AND APPEAL TO THE SUPREME COURT ARE LIKELY PROMPTED BY A DESIRE TO AVOID CHALLENGES TO SUBSEQUENT LEGISLATION AND BDG'S RIGHT TO TRY POWS. THE DECISION TO REMOVE IMMUNITY FROM SELF INCRIMINATION AND UNREASONABLE PUNISHMENT IS LESS UNDERSTANDABLE AND MAY BE A PUBLIC RELATIONS MISTAKE INTERNATIONALLY FOR BDG. IT SHOULD BE POINTED OUT, HOWEVER, THAT THE BANGLADESH CONSTITUTION ALREADY CONSIDERABLY HEDGES THE GUARANTEE OF A NUMBER OF FUNDAMENTAL RIGHTS AND ALLOWS PREVIOUSLY EXISTING (AND SOMETIMES RESTRICTIVE) LAWS TO TAKE PRECEDENCE OVER THE CONSTITUTION (AS NOTED ABOVE).

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